IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

WALTER SESSION, *et al*.	§	
Plaintiffs,	§	
	§	No. 2:03-CV-354
v.	§	Consolidated
	§	
RICK PERRY, *et al*.	§	
Defendants.	§	

STATE DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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State Defendants ask this Court to make two rulings as a matter of law: (1) that the Texas Legislature is free to draw its own redistricting map even though this Court drew a judicial redistricting plan in 2001, and (2) that any claims brought against the new map alleging excessive partisanship must meet the *Bandemer* standard, which these claimants as a matter of law cannot. As to each question, State Defendants seek dismissal on the merits under Rule 12(b)(6) or partial judgment on the pleadings pursuant to Rule 12(c).

Preliminary Statement

This motion seeks to resolve two claims that have been made against the new legislative redistricting map 1374C: (1) whether it was legally permissible for the Legislature to have adopted a redistricting plan at all in 2003 after the Court had issued a plan in 2001 and (2) whether the new plan is susceptible to challenge for being excessively partisan. These claims turn on pure questions of law and accordingly can be resolved at the motion-to-dismiss stage. Dismissing these claims will allow the parties to focus their trial presentations on the legally salient questions.

First, the position taken by various Plaintiffs, intervenors, and amici that the Texas Legislature cannot draw its own redistricting map has no basis in law. There is no bar against such redistricting in the federal Constitution or state Constitution, nor is there any such bar in federal case law. And this Court's adoption of a plan in *Balderas* does not—either explicitly or implicitly—foreclose subsequent action by the Texas Legislature. To the contrary, this Court expressly invited further legislative action to improve the map.

This must be the law. The State Legislature's role in drawing a map is fundamentally different in nature from a federal court's role, which is limited to remedying constitutional or statutory violations with an interim map. A court necessarily approaches the task of drawing such districts reluctantly. Its task is not to draw the best plan for the State, but rather only to draw a minimal, constitutionally sufficient remedial plan. Any improvements on or alterations of that plan that go above and beyond the requirements of the Voting Rights Act or the Constitution are left to the Legislature.

Second, Plaintiffs, intervenors, and amici assert incorrectly that this new legislative plan is susceptible to challenge for being excessively partisan. The Supreme Court's decision in *Bandemer* established that, to state a claim for unconstitutional partisan gerrymandering, there must be a long-term pattern of effects that go beyond mere electoral outcomes. Here, plaintiffs make allegations based on a single electoral outcome, utterly failing as a matter of law to plead the requirements of *Bandemer*.

Standard for Decision

Dismissal should be granted where plaintiffs can prove no set of facts in support of their claim that would entitle them to relief under the controlling law. *McKinney v.*

Irving Indep. Sch. Dist., 309 F.3d 308, 312 (5th Cir. 2002). So, too, judgment on the pleadings should be granted on a claim if the parties do not dispute any material facts and only questions of law are involved. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir. 1998).

Statement of Facts

The facts necessary to resolve this motion are not in dispute. The current congressional map was adopted by the *Balderas* court as a "remedial" measure after the Seventy-Seventh Texas Legislature adjourned without having adopted a new congressional redistricting plan to account for Texas's two new seats in the United States House of Representatives and for intervening changes in population patterns within the State. *Balderas v. Texas*, No. 6:01-CV-158. The *Balderas* court first stayed its hand to allow a state court to formulate a redistricting plan, but the state-court plan was struck down by the Texas Supreme Court on procedural grounds. *Perry v. Del Rio*, 67 S.W.3d 85, 93-94 (Tex. 2001).

Because the State had not adopted a valid redistricting plan, this Court took up the unwelcome task of remedying the "one person, one vote" constitutional violation that had arisen due to population shifts among the congressional districts. *Balderas v. Texas*, No. 6:01-CV-158. "Starting with a blank map of Texas" and "without a state baseline plan in place," *Balderas*, No. 6:01-CV-158, slip op. at 4-5, the three-judge panel conducted a trial, hearing testimony and taking evidence on various congressional redistricting plans submitted to it. *See id.* at 4. After reviewing the evidence and the parties' submissions,

the court applied "neutral districting factors" and produced a congressional redistricting plan for Texas, identified as Plan 1151C. *See id.* at 1, 5 (final judgment).

The Seventy-Eighth Texas Legislature was able to accomplish what its predecessor had not. It was able to adopt a congressional redistricting plan, adopting Plan 1374C in its third-called special session. *See* Tex. H.B. 3, 78th Leg., 3d C.S. (2003).

Argument

I. THE CLAIMS REGARDING THE PROPRIETY OF MID-DECADE REDISTRICTING SHOULD BE DISMISSED.

Plaintiffs assert that Texas gets only one shot to redistrict each decennium and that, if a federal court orders a remedial plan into place before the first congressional election, the Legislature has forfeited its opportunity to redistrict until the next decennial census. This is not, and has never been, the law. It is not supported by either the United States Constitution or the Texas Constitution; it is inconsistent with the limited, narrowly focused role of federal courts in redistricting cases; and it cannot be squared with how federal courts have dealt with redistricting in practice. For plaintiffs to advance this argument now, only after there has been a change in control in the Texas Legislature, is mere political opportunism without any legal foundation.

A. The Texas Legislature Is Given the Constitutional Task of Drawing Congressional Districts.

The Framers put the power to draw Congressional districts firmly in the hands of state legislatures. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *see also Growe v. Emison*, 507 U.S. 25, 26 (1993). Over

time, the Supreme Court has recognized that this power also entails a responsibility on the part of state legislatures to redraw those congressional districts frequently enough to preserve the principle of "one person, one vote" that has developed through the Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Karcher v. Daggett*, 462 U.S. 725, 730 (1983). The Constitution also provides for a reallocation of congressional seats among the various States after each decennial census, necessitating the attention of the legislature of any State that has gained or lost congressional seats. U.S. CONST. amend. XIV, § 2; *see also id*. art. I, § 2, cl. 3; 2 U.S.C. §§2a, 2c. The federal Voting Rights Act also sets a baseline for how redistricting may affect minority groups and imposes a corresponding duty on state legislatures to redistrict consistent with its provisions. 42 U.S.C. §§1973, *et seq*.

In Texas, plenary legislative authority—including that power to draw congressional districts reserved to state legislatures by the United States Constitution—is vested in the two houses of the Texas Legislature. As Article III, section 1 of the Texas Constitution provides: "The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'" TEX. CONST. art. III, § 1; *see also Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001) ("The Legislature is the department constitutionally responsible for apportioning the State into federal congressional districts.").

This authority is given to state legislatures for reasons of institutional competence and as part of the federal design underpinning the Constitution. The United States Supreme Court has repeatedly stated that "reapportionment is primarily a matter for

legislative consideration and determination," *Reynolds*, 377 U.S. at 586, because an elected state legislature is the institution best positioned to reconcile conflicting goals in the people's name. Indeed, *Reynolds* counseled lower federal courts not to order even interim relief until a state legislature has failed to act to remedy the problem "in a timely fashion after having had an adequate opportunity to do so." *Id.* Given this deference to the role of state legislatures, it is inconceivable that interim relief ordered by a federal court could have the effect of foreclosing future redistricting by the very body to which the United States Constitution gave that task: the Texas Legislature.

B. The Adoption of a Constitutional Plan By a Court Does Not Stop the Texas Legislature From Exercising Its Constitutional Redistricting Power.

A number of Plaintiffs, intervenors, and amici argue that this Court's 2001 *Balderas* congressional districting plan forecloses the possibility of any further legislative redistricting until after the 2010 census. That argument is baseless. No constitutional authority—federal or state—supports their assertion. Nor is their assertion consistent with federal precedent recognizing the interim nature of court-drawn plans. Because courts are not institutionally positioned to consider the full range of factors that a state legislature may consider, a court-drawn plan is necessarily a pale substitute for the kind of redistricting that should emerge from the political process. Thus, it is no surprise that this Court's 2001 order in the *Balderas* case not only left the State free to improve that redistricting plan but encouraged it to do so.

1. No Constitutional Provision Limits Texas to One Map Per Decade.

The United States and Texas Constitutions give power to the Texas Legislature to draw district lines for its congressional districts. *See* U.S. CONST. art. I, §4; TEX. CONST. art. III, §1. That much is uncontested. Plaintiffs incorrectly assert, however, that these constitutions somehow limit to one the number of congressional maps a State can use in a given decade.

But Plaintiffs do not and cannot point to any provision in the United States Constitution that constrains the frequency with which state legislatures may redistrict congressionally. Nor can they point to any provision of the Texas Constitution that imposes such limitations. Nor, even, can they point to any decision, Texas or federal, that so much as intimates constitution limitations on the frequency with which the Legislature may redistrict.

By its terms, the United States Constitution does not limit the frequency with which congressional districts may be redrawn. *See* U.S. CONST. art. I, §4. Nor is there any implicit limitation from the constitutional requirement of a census. The Census Clause provides only for the reallocation of congressional seats among the States every ten years; no mention is made of redistricting within individual States on such a schedule. *See id.* art. I, §2, cl. 3; *id.* am. XIV, §2. Although the "one person, one vote" cases provide a floor mandating that redistricting occur often enough to ensure that population levels in each district stay proportionate, *see Reynolds*, 377 U.S. at 583, there has never been a ceiling placed on how often redistricting can happen through the legislative process. Indeed, the Supreme Court and lower courts have expressly recognized that

redistricting more than once per decade is permissible. *See id*. at 584 ("[W]e do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable."); *French v. Boner*, 786 F. Supp. 1328 (M.D. Tenn.), *aff'd*, 963 F.2d 890 (6th Cir.), *cert. den. sub. nom. French v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 506 U.S. 954 (1992).

Lacking any textual authority, Plaintiffs ask this Court to create a new limitation somehow "implicit" in Article I, §4. With an elliptical cite to *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), Plaintiffs assert that such novel limitations can be read wholesale into the U.S. Constitution. But *Term Limits* shows the opposite. There, the Court found that a State cannot add requirements to the text of Article I, §5, which governs qualifications for those seeking election to Congress. The Court reasoned, in part, that §5 fixed congressional qualifications into the Constitution itself, out of the reach of States to modify. *Id.* at 804-05. The Court therefore held that a State could not graft new congressional-election qualifications onto the plain text of Article I, §5 of the Constitution. Here, the situation is reversed. Article I, §4—which governs redistricting—assigns the very responsibility of redistricting to the States. *See* U.S. CONST. art. I, §4. And here it is Plaintiffs—like the losing party in *U.S. Term Limits*—that seek to add words of limitation to the Constitution's plain language.

Nor does the Texas Constitution limit the frequency with which congressional districts may be redrawn. It is instead silent on the entire question of congressional redistricting. Thus, the Texas Constitution does not impose any limitations on congressional redistricting; the Texas Legislature takes the full measure of the power

delegated through Article I, §4 of the United States Constitution. *See* TEX. CONST. art. III, §1. Because the Texas Constitution is devoid of any provision dealing with congressional redistricting, Plaintiffs' argument that the Texas Constitution imposes some limit on redistricting is entirely specious.

Plaintiffs have argued that state-constitutional provisions specific to redistricting of the Texas House and the Texas Senate should be looked to by analogy. *See* TEX. CONST. art. III §28 (providing that if the Legislature does not accomplish state-level redistricting at its first regular session after a decennial census, then the task will be given to the Legislative Redistricting Board of Texas). But these arguments undermine the Plaintiffs' own position. First, that the drafters of the Texas Constitution chose to include redistricting provisions regarding these state-level positions makes their silence on the subject of congressional redistricting all the more telling. The omission means that the Texas Legislature enjoys the full breadth of the power reserved to it by the federal Constitution. Second, even the analogy Plaintiffs seek between congressional redistricting and these state-level procedures would not prove their argument.[1] The Texas Constitution requires merely that redistricting for state-level offices occur at least once per decade; there is no textual bar to further redistricting. TEX. CONST. art. III, §28.

[1] The plaintiffs' argument by analogy also inappropriately asks this Court to rewrite Texas law. Article III, section 28 operates to transfer the Legislature's redistricting power to the Legislative Redistricting Board (LRB) if the Legislature has failed to act on new census results. TEX. CONST. art. III, §28. But Texas recognizes that the LRB is constitutionally prohibited from handling a congressional redistricting. *See Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001) (remedy for legislative failure to draw congressional districts is instead to bring a lawsuit). Thus, under Texas's own view of this state-law matter, the Texas constitutional provision applies solely to state-level offices, not to federal congressional districting.

Thus, even a successful analogy would point only to a minimum frequency of redistricting; it would not imply any prohibition on more frequent redistricting.

In the end, all of Plaintiffs' requests to create a new constitutional limitation on the Legislature's authority to redistrict mid-decade should meet the same fate as the argument made to the same end by lead counsel for the plaintiffs in Laredo. That court squarely rejected arguments that the Legislature's choice to revisit redistricting mid-decade had violated any constitutional rights. *Barrientos v. Texas*, No. L-03-113, slip op. at 3 (S.D. Tex. Sep. 12, 2003) ("We also DISMISS . . . insofar as Plaintiffs claim that the State's decision to consider redistricting legislation . . . violates the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.").

2. Court-Drawn Plans Are By Nature Limited And Do Not Preclude a Later Legislative Plan.

The role of federal courts in redistricting is necessarily a narrow one, focused on remedying violations of the Constitution or of the Voting Rights Act. As this Court noted in *Balderas*: "The Congress has by its enactment of voting rights laws constrained the political process and given the courts a role—to the extent of those constraints. We have no warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act." *Balderas v. Texas*, No. 6:01-CV-583, slip op. at 13-14 (E.D. Tex. Nov. 14, 2003). Accordingly, for a federal court to engage in redistricting gives it "the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task." *Connor v. Finch*, 431 U.S. 407, 415 (1977); *see also Gaffney v.*

Cummings, 412 U.S. 735, 750 (1973). A plan drawn by a federal court is therefore different in character than one drawn by a state legislature, to which the constitutional task was reserved and which can consider the full spectrum of issues bearing on redistricting.

For these reasons, state legislatures are fully empowered to improve upon court-drawn plans before the following decennial census. This conclusion fits the constitutional design, which places redistricting authority squarely with state legislatures and preserves the limited, remedial role of federal courts in this politically sensitive area. Yet Plaintiffs maintain that the federal-court plan in *Balderas*—despite the Court's own statements about the limited nature of its own redistricting inquiry, *see Balderas*, slip op. at 1, 4-5, 10, 11, 13-14—now prevents the Texas Legislature from adopting a new plan through the normal legislative process.

A similar argument concerning mid-decade redistricting was rejected by a panel of the Southern District in a case involving a prior legislative plan that had been approved by the court as constitutional. *See Bush v. Martin*, 251 F. Supp. 484 (S.D. Tex. 1966) (three-judge court). In *Martin*, the court considered the constitutionality of a redistricting plan that had been adopted by the Texas Legislature to remedy a plan previously ruled unconstitutional. *Id.* at 490-94. The court upheld the new legislative plan as minimally constitutional, and went on to expressly refute the argument that since the court "ha[d] recognized H.B. 67's validity for the present, . . . [it] should leave well enough alone until after 1970." *Id.* at 516. Recognizing that "this is the Legislature's first effort toward meeting the constitutional imperative," *id.*, the court concluded that the Legislature was

free to improve upon its plan, if it so desired. As the court explained: "That we do not find [the plan] deficient enough to set it aside and install one of our own is a long way from holding that it is free from shortcomings or that such shortcomings may somehow get frozen into the legislative thinking (or our own) as adequate criteria for the future." *Id.* The court acknowledged, therefore, that the Texas Legislature could choose to improve even the constitutionally sufficient redistricting plan before the next decennial census. *Id.* ("[C]ongressional apportionment is essentially a legislative function. Being legislative in nature, it is not asking too much that the . . . Legislature now take its hand, not against the discrimination of [the old plan], but against the weaknesses and deficiencies of [the new, constitutional plan]."). If the Legislature can take a *second* attempt at redistricting to improve a prior legislatively enacted and court-approved plan in *Bush v. Martin*, it likewise can take its *first* shot here.

This same principle played out in the *Vera v. Bush* litigation in the mid-1990s. There, the court indicated that its proper role was to impose an interim plan only if the Texas Legislature failed to act. *See Vera v. Bush*, 933 F. Supp. 1341, 1344-45 (S.D. Tex 1996) (three-judge court). Because the State had failed to enact a new congressional map through a legislative process, the court stepped in. *Id.* at 1346, 1353. The court understood its relief to be "an interim plan," *id.* at 1345, for the 1996 elections only, *id.* at 1353. Thus, despite a court-drawn plan, the court expressly contemplated that the Texas Legislature would engage in its own redistricting process in its next session. *Id.*

This is entirely consistent with the Supreme Court's guidance about the manner in which federal courts are to step into a void left when a State has not yet drawn its own

legislative plan. In *Wise v. Lipscomb*, the Court observed that the role of a federal court in redistricting is to fix the problem until the Legislature can address it:

> Legislative bodies should not leave their reapportionment tasks to federal Courts; but when those with legislative responsibilities do not respond, or the requirements of the state election laws make it impractical for them to do so, it becomes the 'unwelcome obligation,' . . . of the federal Court to devise and impose a reapportionment plan *pending later legislative action*.

437 U.S. 535, 540 (1978) (emphasis added) (quoted in *Vera v. Bush*, 933 F. Supp. 1341, 1345 (S.D. Tex. 1996)). Indeed, when the Texas Legislature again failed to enact new congressional redistricting legislation in 1997, the *Vera v. Bush* court left the 1996 interim plan in place but recognized the possibility that the Legislature might subsequently adopt its own plan. *See Vera v. Bush*, 980 F. Supp. at 252-53. Likewise, the Texas Legislature was free in this case to replace the court-ordered plan in *Balderas* with its own legislative map reflecting its own policy judgments. *See also* Tex. Att'y Gen. Op. No. GA-0063 (2003) ("We conclude that the Texas Legislature has the authority to adopt a congressional redistricting plan for the period 2003 through 2010. . . .").

C. The *Balderas* Court Did Not Enjoin the Texas Legislature From Enacting a Subsequent Redistricting Plan.

Several plaintiffs mistakenly argue that the *Balderas* judgment enjoined the Texas Legislature from enacting a new redistricting plan. There is, however, no ongoing injunction to now enforce.

The *Balderas* Court's judgment does not use the language of injunction nor does it prohibit the State from enacting a new plan through the legislative process for subsequent elections. Rather, the Court's order adopts its plan as "the *remedial* congressional redistricting plan for the State of Texas." *Balderas*, slip op. at 1 (emphasis added). The use of the term "remedial" underscored what was already apparent: the Court's power to draw districts was institutionally limited, and the proper forum to seek a plan that goes beyond the constitutional minimum is the Legislature, not the Court. *Id.* at 13-15.

Indeed, far from enjoining the State from enacting a new redistricting plan, the *Balderas* Court invited those not happy with the map it had drawn to seek relief in the Texas Legislature. *Id*. at 9. Specifically, several groups had urged the creation of additional majority-minority districts, but the Court concluded that "[t]hese districts are not required by law." *Id.* Thus, these permissive districts "could be created by the State . . . . Whether to do so is, however, a quintessentially legislative question, implicating important policy concerns." *Id.* at 9. Accordingly, "the matter of creating such a permissive district is one for the legislature," *id.* at 13, and the "arguments so ably presented" on behalf of such districts "are directed to the wrong forum." *Id.* at 14. The Texas Legislature, as the right "forum," undertook this "quintessentially legislative" task and created two new minority-opportunity districts in Texas, exactly as the *Balderas* court had invited.

II. THE CLAIMS FOR PARTISAN GERRYMANDERING SHOULD BE DISMISSED.

Plaintiffs have not pleaded, and cannot prove, what is needed to show that a redistricting was unconstitutional because of partisanship. The controlling law is set

forth in *Davis v. Bandemer*, 478 U.S. 109 (1986), which plaintiffs seek to sidestep in favor of speculation about what the Supreme Court may, or may not, hold in a future case. But *Bandemer* is the law, and Plaintiffs cannot meet its test.

A. *Bandemer* Is the Controlling Law On Political-Gerrymandering Claims Until the Supreme Court Holds Otherwise.

In 1986, the Supreme Court in *Bandemer* first recognized the justiciability of a claim that redistricting for partisan purposes could be sufficiently egregious to trigger a constitutional violation. *Bandemer*, 478 U.S. at 124 (White, J.). Justice White's plurality opinion—acknowledged as the controlling opinion—put forward a test that has been used to assess claims of partisan gerrymandering: "in order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127 (White, J.). In *Bandemer*, the Court rejected the plaintiffs' claims, holding that they had failed to meet the "discriminatory effect" prong. *Id.* at 130.

The *Bandemer* test for "discriminatory effects" is, as it should be, very difficult to meet—difficult enough that it has never once resulted in a finding that *any* reapportionment scheme was unconstitutional.[2] Accordingly, it is no surprise that

[2] The one case, of which State Defendants are aware, in which a *Bandemer*-type claim was allowed was not a redistricting case at all. Rather, it dealt with the longstanding method of electing judges in North Carolina, through which nominees of district-level political parties were then voted on in state-wide general elections. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 947 (4th Cir. 1993). Those plaintiffs alleged—unlike here—that the purported "discriminatory effect" had persisted for decades, *id.* at 956-57 (only one Republican had been elected in hundreds of elections since 1900, despite Republicans winning many other district-level and state-wide offices), and—also unlike here—that the discriminatory effects of this election scheme had gone far beyond mere election results, *id.* at 957.

Plaintiffs seek to point this Court to some future, speculative standard that the Supreme Court might, someday, issue.

But *Bandemer* remains the law in this Court until the Supreme Court itself speaks to the contrary. The Supreme Court has made clear that its decisions are to be followed until it, and only it, speaks to the contrary. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("The trial court . . . was . . . correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.").

B. Plaintiffs Have No Claim Under *Bandemer*.

Plaintiffs seek to bring a "partisan gerrymandering" claim on a basis that Justice White's controlling opinion would flatly reject. *Davis v. Bandemer*, 478 U.S. 109, 139 (1986). There simply is no constitutional infirmity in a legislature taking politics into account—or even using politics as the sole factor—in redistricting. *Id*. To present a violation, there must be a "discriminatory intent" and a "discriminatory effect."

Plaintiffs' claims focus almost entirely on "partisan intent" prong, which "[a]s long as redistricting is done by a legislature," the *Bandemer* court acknowledged, is "not very difficult to prove." *Id.* at 128. But the circumstances here render it impossible for plaintiffs to plead or prove the second prong: "discriminatory effect."

Critically, because Plan 1374C has not yet been used in even a single election, the plaintiffs here can hardly satisfy the requirement of *Bandemer* that they show a consistent, long-term pattern of discriminatory effect that would not be equalized through the normal political process. *Id.* at 135-36 (suggesting a need to consider the effect through the 1980s as a whole and to assess whether the party would be able to recover

sufficiently to improve its position in the next round of reapportionment). As the Court said, "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." *Id.* at 135. And mere allegations of bad intent are meaningless without further proof that "the redistricting does in fact disadvantage it at the polls." *Id*. at 139. Here, Plaintiffs flatly fail this test.

Under *Bandemer* a plaintiff cannot plead "discriminatory effect" merely by alleging that a political party would win fewer seats than its popular support statewide might suggest. *Id.* at 130-31 (disproportionate outcomes are "inherent in winner-take-all, district-based elections"); *see also id*. at 131 ("the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm"). The Supreme Court in *Bandemer* plainly required proper allegations of "discriminatory effect" to go beyond mere electoral outcomes, and instead to the ability of a member of a group to participate in the political process as a whole. *Id.* at 131-32 (merely losing elections is not enough because "[a]n individual . . . who votes for a losing candidate is usually deemed to be adequately represented by that candidate and to have as much opportunity to influence that candidate as the other voters in the district."). Nothing in these pleadings does so.

C. The Facts Underlying Plan 1374C, As a Matter of Law, Cannot State a Claim of Political Gerrymandering.

As Plaintiffs cannot meet *Bandemer*, they urge this Court to guess what the Supreme Court might rule in *Vieth*. But even under a hypothetical *Vieth* case, Plaintiffs

would still face a fundamental problem: *Vieth* concerns redistricting maps that frustrate the will of the *political majority* by ensuring that more seats will be awarded to the minority party. That is precisely backwards from what Plaintiffs assert the effect of Plan 1374C will be here. Indeed, if any map would be subject to a *Vieth*-type challenge, it would be Plan 1151C, which elected a majority of Democratic congresspersons while Republicans statewide received 58% of the vote. *See* www.sos.state.tx.us/elections/historical/. Under these facts, Plaintiffs simply cannot, as a matter of law, present a viable gerrymandering under *Bandemer*.

III. THIS COURT SHOULD GRANT THESE MOTIONS TO FOCUS THE TRIAL AND PROVIDE CLARITY TO THE PARTIES.

There are compelling reasons for the Court to grant this motion, even though it may not be heard until three days before the start of trial. Dismissing these two groups of claims will focus the trial on the legal and factual issues regarding which factual evidence might assist the Court. There is no need for the Court to hear, or the large array of parties to prepare, exhaustive evidence concerning the history of Texas redistricting practices when the mid-decade redistricting claims could be resolved through this motion. Nor will there be any need for an even greater number of witnesses to testify to the "partisan intent" of the redistricting when the *Bandemer*-type claim can be dismissed.

Beyond the benefits of a potentially shorter trial on the electoral timetable, which affects all parties, these dismissals will also allow the parties to focus their legal arguments where they will be most effective. As these claims should be resolved as a

matter of law, all parties will ultimately benefit from early guidance so that they can make the most persuasive presentation to the Court on the issues that truly matter.

Conclusion and Prayer

State Defendants respectfully request that the court dismiss on the merits or render partial judgment against: (1) claims that the Texas Legislature may not draw its own congressional redistricting map because this Court drew a judicial redistricting plan in 2001, and (2) claims alleging excessive partisanship for failure to meet the *Bandemer* test. State Defendants also request any attorney's fees or costs, or any other relief, to which they may be entitled.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the State Defendants' Motion to Dismiss and Brief in Support has been delivered to all counsel of record on the 13th day of November, 2003.

_____
Andy Taylor